THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOILERMAKERS NATIONAL ANNUITY TRUST FUND, on Behalf of Itself and All Others Similarly Situated, Plaintiff, v. WAMU MORTGAGE PASS-THROUGH CERTIFICATES, SERIES AR1, et al., Defendants.	Consolidated Case No. C09-0037 (MJP) **DEFENDANTS THE FIRST AMERICAN CORPORATION'S AND eAPPRAISEIT, LLC'S MOTION TO DISMISS AMENDED CONSOLIDATED CLASS ACTION COMPLAINT** **NOTE FOR CONSIDERATION: March 12, 2010** **ORAL ARGUMENT REQUESTED**
NEW ORLEANS EMPLOYEES' RETIREMENT SYSTEM, et al., Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR WASHINGTON MUTUAL BANK, et al., Defendants. ***continued …***	

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

NEW ORLEANS EMPLOYEES' RETIREMENT SYSTEM, et al.,

Plaintiffs,

v.

THE FIRST AMERICAN CORPORATION and FIRST AMERICAN eAPPRAISEIT, LLC,

Defendants.

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DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

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701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

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DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 ! Tel: 206.839.4800

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701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 ! Tel: 206.839.4800

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STATUTES

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 ! Tel: 206.839.4800

Defendants The First American Corporation ("First American") and eAppraiseIT, LLC ("eAppraiseIT") respectfully request that the Court dismiss the Consolidated Class Action Complaint (the "Amended Complaint," or "AC") [Dkt. No. 130] filed by lead plaintiff Policemen's Annuity and Benefit Fund of the City of Chicago ("Chicago PABF").[1]

I. INTRODUCTION

Plaintiffs in this consolidated proceeding seek to pursue federal and state securities claims based on allegedly false and misleading statements in the offering documents for 23 offerings of mortgage pass-through certificates (the "Certificates") issued by certain trusts (the "WaMu Trusts") affiliated with Washington Mutual, Inc. ("WaMu") and Washington Mutual Bank ("WMB"). Plaintiffs claim that the registration statement and 23 separate prospectus supplements through which the Certificates were offered contained material misstatements about the Certificates and about the underlying mortgage loans held by the WaMu Trusts. Plaintiffs assert claims for alleged violations of the Securities Act of 1933 (the "1933 Act") and the Washington State Securities Act ("WSSA") against twelve defendants, including WaMu Asset Acceptance Corporation ("WMAAC") — the entity that filed the registration statement and prospectus supplements — and several other WaMu entities, a number of WMAAC officers, two major rating agencies, and First American and eAppraiseIT.

Plaintiffs' only allegations relating to First American and eAppraiseIT are that eAppraiseIT, First American's subsidiary, inflated unidentified property appraisals that ultimately served as a basis for unidentified mortgage loans originated by WaMu, some unidentified number of which were later pooled by WaMu entities with other mortgage loans, packaged by WaMu entities into mortgage pass-through certificates, and eventually offered by WaMu entities to investors. Based solely on those allegations, Plaintiffs claim that First

[1] In addition to lead plaintiff Chicago PABF, the Amended Complaint is filed by plaintiffs Boilermakers National Annuity Trust ("Boilermakers") and Doral Bank Puerto Rico ("Doral Bank"). Those parties are referred to collectively herein as "Plaintiffs." Other complaints that were consolidated into this proceeding were also filed by New Orleans Employees' Retirement System ("NOERS") and MARTA/ATU Local 732 Employees Retirement Plan ("MARTA"). Plaintiffs, NOERS, and MARTA collectively comprise the "named plaintiffs."

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

American and eAppraiseIT can be liable for alleged misstatements contained in the offering documents for the Certificates under Section 11 of the 1933 Act, 15 U.S.C. § 77k, and WSSA's civil liability provision, RCW 21.20.430.[2] But Plaintiffs do not allege (nor can they) ***any*** connection between First American or eAppraiseIT and the Certificates. Plaintiffs do not allege (nor can they) that First American or eAppraiseIT played any role in any of the securities offerings. Plaintiffs do not allege (nor can they) that the offering documents contained any statements made by, attributed to, or certified by, First American or eAppraiseIT. Plaintiffs do not allege (nor can they) that First American or eAppraiseIT is even mentioned in the offering documents. Plaintiffs do not allege (nor can they) that First American or eAppraiseIT drafted, reviewed, approved, contributed to, or otherwise had any control over any statements in the offering documents. And Plaintiffs do not allege (nor can they) that First American or eAppraiseIT ever had any contact with Plaintiffs or with other investors.

First American and eAppraiseIT are simply too far removed from the Certificates, from Plaintiffs, and from the offering documents about which Plaintiffs complain, to be subject to liability in this lawsuit. Plaintiffs' claims against First American and eAppraiseIT fail as a matter of law for multiple, independent reasons.

First, Plaintiffs lack Article III standing to assert any claims based on the 12 series of Certificates that no named plaintiff claims to have purchased.

Second, Plaintiffs cannot assert any claims against First American and eAppraiseIT based on offering documents that were filed ***before*** any alleged wrongdoing by First American or eAppraiseIT, or before eAppraiseIT even began to do work for WaMu.

Third, First American and eAppraiseIT are not proper defendants to Plaintiffs' Section 11 claim. Neither First American nor eAppraiseIT was named as having certified any portion of the registration statement or prospectus supplements, so Plaintiffs' Section 11 claim against First American and eAppraiseIT fails as a matter of law.

[2] Plaintiffs also assert a "control person" claim under WSSA against First American.

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

Fourth, Plaintiffs' Section 11 claim against First American and eAppraiseIT fails for the additional reason that it is time-barred.

Fifth, Plaintiffs' WSSA claim against First American and eAppraiseIT is preempted by the extensive federal regulatory scheme governing the relevant appraisal practices.

Sixth, Plaintiffs' WSSA claim fails for the additional reasons that Plaintiffs cannot allege that First American or eAppraiseIT made any misrepresentations in connection with the Certificates, and that neither First American nor eAppraiseIT is a "seller" of the Certificates.

Seventh, because Plaintiffs have not alleged a primary violation of WSSA by eAppraiseIT, Plaintiffs' "control person" claim against First American should be dismissed.

In short, each of Plaintiffs' claims against First American and eAppraiseIT is fundamentally flawed in several, independent respects, and the Court has multiple bases for dismissing Plaintiffs' claims against First American and eAppraiseIT.[3] Dismissal should be with prejudice, because the defects are incurable.

II. RELEVANT BACKGROUND

A. Plaintiffs

Plaintiffs are institutional investors who allege that they invested in several of 23 different series of mortgage pass-through certificates, each of which was issued by a different WaMu Trust. AC ¶¶ 25-27. Plaintiffs allege that the registration statement[4] and 23 individual prospectus supplements (collectively, the "Prospectus Supplements") filed by WMAAC with the SEC contained false and misleading statements concerning the Certificates and the mortgage loans held by the WaMu Trusts.

B. First American and eAppraiseIT

First American is a diverse, publicly traded company that, through its subsidiaries, provides business information and related services. AC ¶ 44. eAppraiseIT provides a variety

[3] First American and eAppraiseIT also adopt the additional arguments made in the dismissal briefs of the other defendants to the extent that those arguments apply to Plaintiffs' claims against First American and eAppraiseIT.

[4] *See* WaMu Asset Acceptance Corp., Registration Statement (Form S-3/A) (Jan. 3, 2006) (the "Registration Statement") included at Dkt. No.139-2, pp. 7-31 (WaMu Defendants' Request for Judicial Notice).

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

of appraisal and valuation services to banks and lending institutions. AC ¶ 45.

From approximately June 2006 through October 2007, eAppraiseIT and another company, Lender Services, Inc. ("LSI"), administered WaMu's appraisal program and provided WaMu with appraisal services, through both staff and contract appraisers, in connection with the origination of mortgage loans.[5] Plaintiffs allege, in conclusory fashion, that eAppraiseIT provided appraisals for "many, if not most" of the mortgage loans that were pooled and ultimately placed in the WaMu Trusts that issued the Certificates. *See* AC ¶ 224. Plaintiffs further allege that, beginning sometime in 2006, First American and eAppraiseIT violated federal regulations concerning appraiser independence by acquiescing in WaMu's attempts to exercise undue control over the selection of appraisers. *E.g.*, AC ¶ 118. Plaintiffs claim that, as a result of WaMu's undue influence, appraisals performed by eAppraiseIT overstated the value of properties appraised for WaMu. AC ¶ 131. On November 1, 2007, the New York Attorney General filed a lawsuit against First American and eAppraiseIT, alleging that eAppraiseIT had allowed WaMu to improperly pressure its appraisers to increase appraisal values in connection with loans originated by WaMu. *See* AC ¶ 119; Complaint, *People ex rel. Cuomo v. First American Corp.*, No 07/406796 (N.Y. Sup. Ct.) (the "NYAG Complaint").

C. The Mortgage Pass-Through Certificates

Between January 2006 and March 2007, various WaMu Trusts offered 23 different series of mortgage pass-through certificates for public sale. Each series of Certificates was issued by a different WaMu Trust — *e.g.*, the 2006-AR4 Certificates[6] were issued by the WaMu Mortgage Pass-Through Certificates Series 2006-AR4 Trust. *See* April 21, 2006 Prospectus Supplement for the 2006-AR4 Certificates (the "2006-AR4 Prospectus

[5] *See* First Amended Complaint for Violations of Sections 11, 12(a)(2) and 15 of the Securities Act of 1933, at ¶ 59, *New Orleans Employees' Retirement System v. Wash. Mut. Bank*, No. 09-134 (W.D. Wash.) [Dkt. No. 1] (the "*NOERS I* Complaint"); Class Action Complaint, at ¶ 53, *New Orleans Employees' Retirement System v. First Am. Corp.*, No. 09-137 (W.D. Wash.) [Dkt. No. 1] (the "*NOERS II* Complaint").

[6] For purposes of this Motion, the individual series of Certificates will be referred to in short form, *i.e.*, the WaMu Mortgage Pass-Through Certificates, Series 2006-AR4 will be referred to as "2006-AR4," and the series will sometimes collectively be referred to as the "Certificates." A complete list of the securities at issue is included at paragraph 39 of the Amended Complaint.

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

Supplement") at S-1 ("The certificates will represent interests only in the issuing entity which is WaMu Mortgage Pass-Through Certificates Series 2006-AR4 Trust ….").[7] Each issuing WaMu Trust owns a unique pool of mortgage loans — ranging in size from 471 loans (2006-AR2) to 4,086 loans (2007-HY1), and ranging in loan value from $332 million (2006-AR2) to $3 billion (2007-HY1). Keehnel Decl., Ex. B.[8] The Certificates represent ownership interests in the issuing WaMu Trusts. *See, e.g.*, 2006-AR4 Prospectus Supplement at S-5. Holders receive monthly distributions based on the payments of principal and interest on the mortgage loans held by the WaMu Trusts. *See id.* at S-12. WMB originated only a portion of the mortgage loans held by the issuing WaMu Trusts. *See* AC ¶ 7 ("All of the mortgage loans underlying the Certificates were originated by WMB ***or otherwise acquired by WMB*** ….") (emphasis added); 2006-AR4 Prospectus Supplement at S-34.

The offering documents for the Certificates do ***not*** contain any statements or representations made by, or attributed to, First American or eAppraiseIT. The offering documents do ***not*** identify specifically the loans held by the WaMu Trusts, the properties that serve as collateral for the loans, the appraised value of those properties, or the identity of any appraisers who performed appraisals on the properties. The offering documents also do ***not*** include any appraisal reports obtained in connection with the origination of the loans, nor do they reproduce any information contained in those reports.

D. The Securitization Process

WMB originated (and purchased from other lenders) hundreds of billions of dollars in

[7] The 2006-AR4 Prospectus Supplement is illustrative of the Prospectus Supplements issued for the various Certificates and is attached as Exhibit A to the Declaration of Stellman Keehnel ("Keehnel Decl."). To avoid burdening the Court with unnecessarily voluminous exhibits, only relevant excerpts of other Prospectus Supplements cited herein are attached as exhibits.

[8] The Court may take judicial notice of the information contained in Exhibit B to the Keehnel Declaration (which was taken directly from the Prospectus Supplements) and the publicly filed documents included as exhibits to the Keehnel Declaration because they are matters of public record required to be filed with the SEC, and because Plaintiffs relied on those documents and other documents referenced in the Complaint, "but which are not physically attached." *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999); *McGuire v. Dendreon Corp.*, No. C07-800MJP, 2008 WL 1791381, *4 (W.D. Wash. Apr. 18, 2008) ("A court may take judicial notice of documents that are referenced by the plaintiff in the complaint and whose authenticity are not in dispute, such as SEC filings….").

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

residential mortgage loans on a yearly basis. *See* 2006-AR4 Prospectus Supplement at S-34 (showing origination of $212 billion in mortgage loans in 2004 and $207 billion in 2005); AC ¶ 62 (alleging that WMB originated $229 billion in mortgage loans in 2006). WMB held many of those mortgage loans in its own investment portfolio, but WMB also — through related entities — securitized a fraction of those loans. *See* 2007-HY3 Prospectus Supplement at S-23 (Keehnel Decl. Ex. C) (showing securitization of $34 billion in mortgage loans in 2004, $71 billion in 2005, and $70 billion in 2006). WMB selected mortgages for securitization transactions from its loan portfolio "based on a variety of considerations, including type of mortgage loan, geographic concentration, range of mortgage interest rates, principal balance, credit scores and other characteristics." *See* 2006-AR4 Prospectus Supplement at S-57.

In the *NOERS I* Complaint, the plaintiffs described the securitization process as follows:

> [I]n the typical securitization transaction, ***participants in the transaction are the sponsor (who is often also the loan servicer), the depositor, the underwriter, the issuing trust and investors***. On the closing date of a trust series, the mortgage loans supporting the trust are first sold by the sponsor of the securitization transaction to the depositor in return for cash…. The depositor then sells those mortgage loans and related assets to the trust, in exchange for the trust issuing certificates to the depositor. The depositor then works with the underwriter of the trust to price and sell the certificates to investors.

NOERS I Complaint ¶ 39 (emphasis added). For the Certificates at issue in this case, WMB served as the sponsor and the servicer (AC ¶ 29), WMAAC was the depositor (AC ¶ 28), and the Certificates were issued by various WaMu Trusts. AC ¶ 1.

E. <u>Procedural Background</u>

By order dated August 14, 2009 [Dkt. No. 70], this Court consolidated three lawsuits then pending in the Western District of Washington that asserted claims against various defendants relating to the Certificates: (1) *Boilermakers National Annuity Trust Fund v. WaMu Mortgage Pass-Through Certificates*, No. 09-0037, which asserted claims under the 1933 Act against the WaMu Trusts and certain other WaMu defendants; (2) *New Orleans Employees' Retirement System v. Washington Mutual Bank*, No. 09-134 ("*NOERS I*"), which also asserted claims under the 1933 Act against various WaMu defendants; and (3) *New*

Orleans Employees' Retirement System v. First American Corp., No. 09-137 ("*NOERS II*"), which asserted exclusively Washington state law claims against First American and eAppraiseIT. On December 31, 2009, Plaintiffs filed the Amended Complaint.[9]

III. PLAINTIFFS LACK STANDING TO ASSERT ANY CLAIMS BASED ON THE 12 SERIES OF CERTIFICATES THAT NO NAMED PLAINTIFF PURCHASED.

To meet the "irreducible constitutional minimum" requirement of Article III standing to bring a claim, a plaintiff must establish that it (1) suffered an "injury in fact" that is (2) fairly traceable to challenged conduct of the defendant, and that is (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In multiple-claim cases, including class actions, Article III requires that at least one named plaintiff have standing for each claim asserted in the complaint. *See Williams v. Boeing Co.*, No. C98-761P, 2005 WL 2921960, *3 (W.D. Wash. Nov. 4, 2005) ("In cases where multiple claims are asserted, it is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to just one of many claims he wishes to assert. Instead, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.") (internal citation and quotations omitted).

In securities cases, those fundamental standing principles translate to the requirement that, to have standing to bring claims on behalf of purchasers of any security, at least one named plaintiff must have purchased that security. *See, e.g., In re Wash. Mut., Inc. Sec., Derivative & ERISA Litig.*, No. 2:08-md-1919 MJP, 2009 WL 3517630, *18 (W.D. Wash. Oct. 27, 2009) ("Plaintiffs do not have standing to pursue § 11 claims as to the 5.50% Notes. There is no named plaintiff who can be deemed a 'person acquiring such security' (the 5.50% Notes)

[9] On October 30, 2009, Doral Bank filed a complaint against First American, eAppraiseIT, and various WaMu defendants relating to 10 series of Certificates not alleged in any of the consolidated actions. *See* Complaint, *Doral Bank Puerto Rico v. Wash. Mut. Asset Acceptance Corp.*, No. 09-1557 (W.D. Wash.) (the "*Doral Bank* Complaint"). On November 19, 2009, Chicago PABF and Doral Bank filed a joint motion to consolidate the *Doral Bank* lawsuit with the other consolidated actions. [Dkt. No. 101]. On December 18, 2009, the Court denied the motion to consolidate without prejudice to renewal after Doral Bank provides the notice required by the PSLRA. [Dkt. No. 118].

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

as required by § 11(a), and, thus, no named plaintiff has suffered an 'actual injury.'"); *Hoffman v. UBS-AG*, 591 F. Supp. 2d 522, 530-31 (S.D.N.Y. 2008) ("Plaintiffs in this case cannot meet the [Article III] injury requirement for claims relating to funds in which they have not purchased shares because they cannot claim to be personally injured by the violations relating to those funds.").[10]

In *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, --- F. Supp. 2d ---, 2009 WL 3149775 (D. Mass. 2009), the court applied Article III standing principles to a purported class action relating to mortgage pass-through certificates issued by trusts affiliated with Nomura Asset Acceptance Corporation. In *Nomura*, the plaintiffs — who alleged that they had purchased securities from two series of certificates — attempted to sue defendants for violations of the 1933 Act based on eight series of certificates. *Id.* at *2. On defendants' motion to dismiss, the court explained that each series of certificates was issued by a separate legal entity pursuant to a separate prospectus and was backed by a unique pool of mortgages, and the court held, consistent with "the overwhelming weight of authority," that plaintiffs lacked both Article III and statutory standing to assert claims based on the six series of certificates that no named plaintiff claimed to have purchased. *Id.* at *3-4.

Nomura is directly on point. Plaintiffs purport to represent a putative class consisting of all persons who acquired any of 23 different series of mortgage pass-through certificates, issued pursuant to 23 different prospectus supplements. AC ¶¶ 2, 39. Each series of Certificates was issued by a different legal entity and is backed by a completely unique pool of hundreds or thousands of mortgage loans. The named plaintiffs in this consolidated proceeding allege that they purchased ***only 11 of the 23 securities that are the subject of the Amended Complaint***.[11] Plaintiffs plainly lack Article III standing to pursue claims on behalf of the purchasers of the

[10] *See also In re AIG Advisor Group Sec. Litig.*, No. 06 CV 1625(JG), 2007 WL 1213395, *4 (E.D.N.Y. Apr. 25, 2007); *In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 607 (S.D.N.Y. 2006).

[11] *See* AC ¶¶ 25 (Chicago PABF purchased Certificates 2006-AR5, 2006-AR12, 2006-AR16, and 2007-HY1), 26 (Boilermakers purchased Certificates 2006-AR7), 27 (Doral Bank purchased Certificates 2006-AR17 and 2006-AR18); *NOERS II* Complaint ¶¶ 16 (NOERS purchased Certificates 2006-AR14, 2006-AR16 and 2006-AR18), 17 (MARTA purchased Certificates 2006-AR2, 2006-AR16, 2006-AR18, 2007-HY2, and 2007-HY4).

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

other 12 series of Certificates, because Plaintiffs have not alleged that they purchased any of those 12 securities. *See Wash. Mut.*, 2009 WL 3517630 at *18; *Siemers v. Wells Fargo & Co.*, No. C 05-04518 WHA, 2006 WL 3041090, *7 (N.D. Cal. Oct. 24, 2006) ("Plaintiff cannot sue on behalf of funds he does not own."). Accordingly, pursuant to Article III and Rule 12(b)(1), the Court should dismiss all of Plaintiffs' claims based on Certificates 2006-AR1, 2006-AR3, 2006-AR4, 2006-AR6, 2006-AR8, 2006-AR9, 2006-AR10, 2006-AR11, 2006-AR13, 2006-AR15, 2006-AR19 and 2007-HY3.

IV. PLAINTIFFS CANNOT ASSERT ANY CLAIMS AGAINST FIRST AMERICAN AND EAPPRAISEIT BASED ON OFFERING DOCUMENTS OR SECURITIES THAT PRE-DATE THEIR ALLEGED CONDUCT.

Plaintiffs attempt to hold all defendants, including First American and eAppraiseIT, liable for alleged misstatements and omissions in the offering documents for all 23 series of Certificates. But the document on which Plaintiffs rely for all of their allegations against First American and eAppraiseIT — the NYAG Complaint — establishes that First American and eAppraiseIT could not have been involved with, or bear any liability for, many of the alleged misstatements of which Plaintiffs complain, for the simple reason that many of those statements were made ***before First American or eAppraiseIT had any relationship with WaMu***.

Plaintiffs' allegations against First American and eAppraiseIT in the Amended Complaint are deliberately vague. But Plaintiffs cannot artfully plead themselves into a claim against First American and eAppraiseIT by simply omitting facts about which there can be no dispute. The allegations of the NYAG Complaint — from which all of Plaintiffs' allegations against First American and eAppraiseIT are drawn — establish that eAppraiseIT first began providing appraisal services for WaMu no earlier than spring 2006. NYAG Complaint ¶ 25 ("WaMu retained eAppraiseIT in spring 2006 ....").[12] The Registration Statement was filed, as

[12] A copy of the NYAG Complaint is included as Exhibit D to the Keehnel Declaration. The Court can consider the NYAG Complaint on this motion to dismiss because Plaintiffs relied on that document in drafting the Amended Complaint. *E.g.*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (courts may consider documents "*integral to or explicitly relied* upon in the complaint") (internal quotation omitted); *Spain v. Deutsche Bank*, No. 08 Civ. 10809(LBS), 2009 WL 3073349, *2 (S.D.N.Y. Sept. 18, 2009). Similarly, the *NOERS II* Complaint alleges that eAppraiseIT began providing appraisals for WaMu in April 2006. *See*

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

amended, in January 2006 (*see* AC ¶ 1), ***months before*** eAppraiseIT performed any appraisal services for WaMu. Similarly, the prospectus supplements for at least three series of Certificates described in the Complaint were filed with the SEC ***months before*** Plaintiffs claim that eAppraiseIT began performing appraisals for WaMu. *See* AC ¶ 39. First American and eAppraiseIT cannot, under any circumstances, be responsible for statements made ***before*** eAppraiseIT was even performing services for WaMu. Accordingly, all of Plaintiffs' claims against First American and eAppraiseIT necessarily fail insofar as they relate to the Registration Statement or to Certificates 2006-AR1, 2006-AR2, or 2006-AR3.

V. PLAINTIFFS' SECTION 11 CLAIM AGAINST FIRST AMERICAN AND EAPPRAISEIT SHOULD BE DISMISSED.

A. First American And eAppraiseIT Are Not Proper Defendants To Plaintiffs' Section 11 Claim.

Section 11 of the 1933 Act provides a private right of action to a person who purchases a security pursuant to a registration statement that contains false or misleading statements of material fact. *See* 15 U.S.C. § 77k(a). By the express terms of the statute, a Section 11 cause of action extends ***only*** to a limited, enumerated class of defendants — persons who signed the registration statement, directors of the issuer, underwriters of the security at issue, and experts named as having prepared or certified a portion of the registration statement. *See id.* § 77k(a)(1)-(5); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983) ("Section 11 of the 1933 Act allows purchasers of a registered security to sue ***certain enumerated parties*** in a registered offering ….") (emphasis added); *In re Worlds of Wonder Sec. Litig.*, 694 F. Supp. 1427, 1434 (N.D. Cal. 1988) ("Section 11 liability is limited to persons who sign the registration statement, directors of the issuer, underwriters of that issue, or experts named as preparing or certifying a portion of the registration statement."). Although "appraisers" are included, along with accountants and engineers, in the list of "experts" who can be subject to liability under Section 11, it is black-letter law that an expert can be liable ***only*** if it is ***expressly***

identified in the registration statement as having prepared or certified a portion of the registration statement, and even then the expert can be liable only for the portion that it prepared or certified — the so-called "expertised" portion of the registration statement. *See Huddleston*, 459 U.S. at 381 n.11 ("Accountants are liable under Section 11 only for those matters which purport to have been prepared or certified by them."); *Worlds of Wonder*, 694 F. Supp. at 1434 ("Accountants cannot be held liable under Section 11 unless the misleading information can be expressly attributed to them."); *Adair v. Kay Kotts Assocs., Inc.*, No. 97 Civ. 3375(SS), 1998 WL 142353, *4 (S.D.N.Y. Mar. 27, 1998) (Sotomayor, J.) (same).

In this case, Plaintiffs attempt to assert a Section 11 claim against First American and eAppraiseIT based on alleged misstatements in the Registration Statement and 23 Prospectus Supplements. But Plaintiffs ***do not*** allege (nor can they) that First American or eAppraiseIT signed or certified any portion of the Registration Statement or Prospectus Supplements. Indeed, Plaintiffs ***do not*** allege (nor can they) that either First American or eAppraiseIT was even named in the Registration Statement or Prospectus Supplements. Accordingly, Plaintiffs' Section 11 claim fails as a matter of law and should be dismissed with prejudice. *See, e.g.*, *McFarland v. Memorex Corp.*, 493 F. Supp. 631, 643 (N.D. Cal. 1980) ("The *only* question is whether the accountants are '*named* as having prepared or certified any part of the registration statement.'") (quoting 15 U.S.C. § 77k(a)(4); emphasis in original); *In re Jiffy Lube Sec. Litig.*, No. Civ. Y-89-1939, 1990 WL 10010982 (D. Md. Oct. 31, 1990) (dismissing Section 11 claim against accountant because plaintiffs failed to "identify those misstatements or omissions which are expressly attributed to defendant Ernst & Young"); *Hagert v. Glickman, Lurie, Eiger & Co.*, 520 F. Supp. 1028, 1035 (D. Minn. 1981) ("There is no allegation that this defendant signed or expertised any portion of the registration statement. Absent such an allegation, a claim of a primary violation of Section 11 cannot be made out against this defendant.").

B. <u>Plaintiffs' Section 11 Claim Is Time-Barred</u>.

Plaintiffs' Section 11 claim against First American and eAppraiseIT should be

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

dismissed for the independent reason that it is barred by the one-year statute of limitations. Plaintiffs did not assert a Section 11 claim against First American or eAppraiseIT until November 23, 2009, more than ***two years*** after an investor exercising reasonable diligence would have discovered the factual basis for Plaintiffs' claims. Indeed, no plaintiff asserted ***any*** claims against First American or eAppraiseIt until December 24, 2008 (the *NOERS II* Complaint), nearly 14 months after the one-year limitations period began to run.

Section 13 of the 1933 Act, 15 U.S.C. § 77m, sets the statute of limitations for claims under Section 11 and provides, in relevant part, that a claim under Section 11 must be filed within the shorter of: (1) "one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence"; or (2) three years after the offering of the security at issue. Section 13's one-year limitations period can be triggered by either actual notice or inquiry notice. *See Betz v. Trainer Wortham & Co.*, 504 F.3d 1017, 1022 (9th Cir. 2007), *amended on denial of rehearing*, 519 F.3d 863 (9th Cir. 2008). In inquiry notice cases, the Ninth Circuit applies an "inquiry-plus-reasonable-diligence test" to determine when Section 13's limitations period begins to run. *See id.* at 1024. The court first determines "when the plaintiff had inquiry notice of the facts giving rise to his or her securities fraud claim." *Id.* Once the plaintiff is on inquiry notice, the statute of limitations begins to run "when the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud." *Id*. at 1024-25. Where the information underlying the plaintiff's claim is disclosed in sufficient detail, the inquiry notice and reasonable diligence questions "merge" into a single inquiry. *See In re Am. Funds Sec. Litig.*, 556 F. Supp. 2d 1100, 1110 (C.D. Cal. 2008); *Kreek v. Wells Fargo & Co.*, 652 F. Supp. 2d 1053, 1060 (N.D. Cal. 2009).

In this case, the one-year statute of limitations for Plaintiffs' Section 11 claim against First American and eAppraiseIT began to run no later than ***November 1, 2007***, when the New York Attorney General filed the NYAG Complaint, alleging that eAppraiseIT acquiesced in

WaMu's improper attempts to control the selection of appraisers and to pressure appraisers to increase the appraised values of properties. As noted above, the NYAG Complaint is the ***sole*** source of Plaintiffs' allegations against First American and eAppraiseIT. All of Plaintiffs' substantive allegations against First American and eAppraiseIT either explicitly refer back to the NYAG Complaint or are simply copied nearly verbatim from the NYAG Complaint. *See* AC ¶¶ 120 ("The NYAG Complaint alleges …."), 121 & 130 ("According to the NYAG Complaint …."), 122 ("The NYAG Complaint contains …."), 125-132 (restating allegations from NYAG Complaint). In addition, the NYAG Complaint expressly alerted Plaintiffs to the very harms that Plaintiffs allege — the potential harm to investors from allegedly overvalued mortgage-backed securities. NYAG Complaint ¶¶ 13, 16, 17.[13] Thus, as of November 1, 2007, all of the information supporting Plaintiffs' factual allegations against First American and eAppraiseIT was available to Plaintiffs. *See, e.g., NOERS II* Complaint ¶ 9 (alleged conduct of First American and eAppraiseIT "came to light" with filing of NYAG Complaint).

Based on the allegations of the NYAG Complaint, any reasonably diligent investor would have discovered the facts underlying his or her claim against First American and eAppraiseIT no later than November 1, 2007. *See, e.g., Am. Funds*, 556 F. Supp. 2d at 1109 (statute of limitations began to run no later than date of prior, similar complaint, where plaintiffs' allegations were nearly "verbatim copy" of earlier allegations; "The very existence of the *Corbi* complaint ... is nearly dispositive evidence that there was sufficient information in the public sphere to impart inquiry notice on reasonable investors ...."); *Kreek*, 652 F. Supp. 2d at 1058-60 (dismissing federal securities claims as time-barred based on, *inter alia*, existence of

[13] Contemporaneous media coverage also explicitly made a connection between the allegations of the NYAG Complaint and the value of mortgage-backed securities. *See* Drew DeSilver, *WaMu Accused of Pushing Appraisers to Inflate Values*, Seattle Times, Nov. 2, 2007 (Keehnel Decl. Ex. E); (describing potential harm to investors in mortgage-backed securities if borrowers default on artificially inflated mortgages); *N.Y. Attorney General Says WaMu Demanded Higher Appraisals*, Puget Sound Bus. J., Nov. 1, 2007 (Keehnel Decl. Ex. F) (quoting Andrew Cuomo as stating that "[i]nvestors are hurt" by conduct alleged in NYAG Complaint "because it skews the value and risk of loans that are sold in financial markets"). The Court may take judicial notice of those articles for the purpose of determining what information was available to Plaintiffs in November 2007. *See Van Saher v. Norton Simon Museum of Art at Pasadena*, --- F.3d ----, 2010 WL 114959, *4 (9th Cir. 2010).

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prior complaint containing materially similar allegations). Because Plaintiffs did not assert a Section 11 claim against First American or eAppraiseIT until ***November 23, 2009***, more than two years after the NYAG Complaint was filed, Plaintiffs' Section 11 claim against First American and eAppraiseIT should be dismissed as time-barred. Moreover, Plaintiffs' Section 11 claim is time-barred irrespective of whether that claim relates back to the *NOERS II* Complaint, which asserted only state law claims against First American and eAppraiseIT; the *NOERS II* Complaint was not filed until December 24, 2008, nearly fourteen months after the NYAG Complaint, and nearly two months after the one-year statute of limitations expired.

VI. PLAINTIFFS' WSSA CLAIM AGAINST FIRST AMERICAN AND EAPPRAISEIT IS PREEMPTED BY FEDERAL LAW.

A. HOLA Created A Pervasive Federal Regulatory Scheme That Leaves No Room For State Regulation Or Oversight.

Federal preemption of state law and regulation is assured if the state purports to "regulate[] in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). The field of banking is one such area. *See* Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 *et seq.*; *see also Bank of Am. v. City of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). "HOLA was designed to restore public confidence by creating a nationwide system of federal savings and loan associations to be centrally regulated according to nationwide 'best practices.'" *Silvas v. E*Trade Mortgage Corp*., 514 F.3d 1001, 1004 (9th Cir. 2008).

"Through HOLA, Congress gave the Office of Thrift Supervision ("OTS") broad authority to issue regulations governing thrifts." *Id.* at 1005 (citing 12 U.S.C. § 1464). "As the principal regulator for federal savings associations, OTS promulgated a preemption regulation at 12 C.F.R. § 560.2. That the preemption is expressed in OTS's regulation, instead of HOLA, makes no difference because, '[f]ederal regulations have no less preemptive effect than federal statutes.'" *Id.* (quoting *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). 12 C.F.R. § 560.2 expressly provides that: "OTS hereby ***occupies the entire field*** of

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lending regulation for federal savings associations." (Emphasis added.) Subsection 560.2(b) delineates specific types of state laws that are preempted by OTS regulations, including state laws relating to "[d]isclosure and advertising" and "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." 12 C.F.R. § 560.2(b)(9) & (10).

B. FIRREA Extends OTS's Pervasive Reach To Appraisal Programs And Institution-Affiliated Parties, Such As eAppraiseIT.

With the passage of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 3301 *et seq.*, in 1989, Congress amended HOLA and, among other things, expanded federal oversight of savings and loan associations to include review and regulation of appraisal programs. In enacting FIRREA, Congress intended to:

> provide that Federal financial and public policy interests in real estate related transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards ….

12 U.S.C. § 3331. Under FIRREA, the ***exclusive*** responsibility for examination of real estate lending and appraisal programs implemented by federally-regulated savings and loans falls to OTS. *Id.*

Under the broad authority granted it under Title XI of FIRREA, OTS issued extensive regulations addressing appraisal programs undertaken by and for savings and loans. *See* 12 C.F.R. pt. 564. The purpose and scope of the regulations are as follows:

> Title XI provides protection for federal financial and public policy interests in real estate related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. ***This part implements the requirements of title XI and applies to all federally related transactions entered into by the OTS or by institutions regulated by the OTS.***

12 C.F.R. § 564.1(b) (emphasis added). The regulations extend not only to savings and loans, but also to "***institution-affiliated parties, including staff and fee appraisers***." *Id*. § 564.7 (emphasis added). "Institution-affiliated parties" is defined under the Federal Deposit Insurance Act, 12 U.S.C. § 1813, to include independent contractors through whom thrifts

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701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

operate, including staff and fee appraisers. 12 U.S.C. § 1813(u)(4).

OTS regulations in the field of appraisals are exhaustive. The regulations identify which real estate-related financial transactions require the services of an appraiser, prescribe which categories of federally-related transactions must be appraised by a state-certified or state-licensed appraiser, and prescribe minimum standards for the performance of real estate appraisals in connection with federally-related transactions under its jurisdiction. *See* 12 C.F.R. §§ 564.2-564.4.[14] FIRREA and its accompanying regulations also expressly limit the states' role in the appraisal field to the supervision of the professional conduct of individual appraisers. *See* 12 U.S.C. §§ 3346-3348. OTS regulations also directly address and define "Appraiser independence" for both staff and fee appraisers. *See* 12 C.F.R. § 564.5.

C. Plaintiffs' WSSA Claim Is Preempted And Must Be Dismissed.

As discussed above, OTS (through HOLA and FIRREA) occupies the entire field of regulation for lending and appraisal programs implemented by federally regulated savings and loans, and OTS regulations — specifically 12 C.F.R. § 560.2 — preempt state law claims related to that regulatory scheme. In *Silvas*, the Ninth Circuit established a framework for evaluating whether a particular state law claim is preempted by 12 C.F.R. § 560.2:

> "When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption."

514 F.3d at 1005 (quoting OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996)).

Importantly, the *Silvas* court held that a state law claim is preempted by section 560.2(b) if the state law, ***as applied to the particular case***, falls within one of the categories

[14] The OCC, Federal Reserve, and FDIC have each promulgated regulations pursuant to FIRREA identical to those issued by OTS in 12 C.F.R. §§ 564.1–564.6. *See* 12 C.F.R. §§ 34.41–34.47 (OCC); 12 C.F.R. §§ 225.61–225.67 (Federal Reserve); and 12 C.F.R. §§ 323.1–323.7 (FDIC).

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listed in section 560.2(b): "As outlined by OTS, the first step is to determine if [the state law], ***as applied***, is a type of state law contemplated in the list under paragraph (b) of 12 C.F.R. § 560.2. If it is, the preemption analysis ends." 514 F.3d at 1006 (emphasis added). Thus, *Silvas* makes clear that the preemptive reach of section 560.2(b) is ***not*** limited to state laws that on their face attempt to regulate lending or appraisal programs. *Id.*; *see Casey v. FDIC*, 583 F.3d 586, 595 (8th Cir. 2009) ("We conclude that a state law that either on its face or as applied imposes requirements regarding the examples listed in § 560.2(b) is preempted.").

Applying the *Silvas* framework, courts have repeatedly held that 12 C.F.R. § 560.2 preempts state statutory claims relating to federally regulated transactions, including appraisal practices. For example, in *Cedeno v. IndyMac Bancorp, Inc.*, No. 06 Civ. 6438(JGK), 2008 WL 3992304 (S.D.N.Y. Aug. 26, 2008), the court held that 12 C.F.R. § 560.2 preempted state law claims that were — like Plaintiffs' claims in this case — based on allegations concerning inflated appraisals in connection with residential real estate transactions:

> ***The appraisal practices challenged by the plaintiff appear to relate directly to the processing or origination of mortgages, and thus the application of the law that the plaintiff seeks to impose falls within 12 CFR § 560.2(b)(10). . . .*** Therefore, … the California [consumer protection claim] is preempted under 12 C.F.R. § 560.2(b)…. The same analysis with respect to the California [consumer protection statute] applies to the plaintiff's efforts to use the New York statute to penalize the alleged failure to disclose appraisal practices and the substance of those practices…. The appraisals are a prerequisite to the lending process, and are inextricably bound to it.

2008 WL 3992304 at *8-9 (emphasis added); *see also Casey*, 583 F.3d at 595-96 (Missouri statutes relating to commercial fraud and unauthorized practice of law preempted as applied to claims concerning loan fees); *Hilton v. Wash. Mut. Bank*, No. C 09-1191 SI, 2009 WL 3485953, *5 (N.D. Cal. Oct. 28, 2009) (state law claims based on, *inter alia*, alleged inflated appraisals preempted by section 560.2(b)); *In re Countrywide Fin. Corp. Mortgage Mktg. & Sales Practices Litig.*, 601 F. Supp. 2d 1201, 1223 (S.D. Cal. 2009) ("[Plaintiffs'] claims … purport to impose requirements on Defendants' 'disclosure and advertising.' Therefore, [plaintiffs' state law] claims are preempted."); *Alcaraz v. Wachovia Mortgage, FSB*, No. CV F

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701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

08-1640 LJO SMS, 2009 WL 160308, *6 (E.D. Cal. Jan. 21, 2009) (state-law unfair business practices claim preempted by HOLA.).

The U.S. District Court for the Northern District of California has twice dismissed state law claims asserted against eAppraiseIT — claims based on the very same factual allegations as Plaintiffs' claims in this lawsuit — as preempted by 12 C.F.R. § 560.2(b)(10):

> Plaintiffs[’] first UCL claim is based on EA's allegedly unlawful conduct in contravention of the Uniform Standards of Professional Appraisal Practice ("USPAP"). Specifically, plaintiffs allege that EA violated the requirement that an appraisal be performed with impartiality, objectivity, and independence…. Plaintiffs' second and third UCL claims, which concern the same conduct, allege that that the impartiality of the offered appraisals constituted unfair and fraudulent business practices …. Plaintiffs[’] CLRA claim alleges that EA represented that their home appraisal services were of a standard or quality that they were not….
>
> ***Each of these claims relate[s] directly to the processing and origination of mortgages.*** Appraisals are required for many real-estate transactions. And those appraisals must be performed according to certain standards in order to protect the public and federal financial interests. Indeed, plaintiffs' theory of the case, that lenders and appraisers conspired to inflate appraisals in order to increase mortgage resale prices, demonstrates the importance and interrelationship of impartial appraisals to mortgage origination and servicing. ***The court therefore finds that plaintiffs' UCL and CLRA claims … relate to the processing and origination of, and participation in, mortgages, and are thus preempted under § 560.2(b)(10).***

Spears v. Wash. Mut., Inc., No. C-08-00868 RMW, 2009 WL 605835, *5-6 (N.D. Cal. Mar. 9, 2009) ("*Spears I*") (internal citations omitted; emphasis added); *Spears v. Wash. Mut., Inc.*, No. C-08-00868 RMW, 2009 WL 2761331, *6 (N.D. Cal. Aug. 30, 2009) ("*Spears II*") (breach of contract claim preempted by section 560.2(b)).

Here, as in *Spears*, the gravamen of Plaintiffs' allegations is that First American and eAppraiseIT supposedly violated federal rules and regulations relating to appraiser independence. The Amended Complaint repeatedly references federal law, regulations, and standards, and then alleges that First American and eAppraiseIT violated those standards. *See, e.g.*, AC ¶¶ 73-76 (discussing federal appraisal standards), 81 ("[T]he appraisals that eAppraiseIT performed for WaMu did not conform to the USPAP standards ...."), 118 ("The Appraiser Defendants violated USPAP guidelines ...."). Plaintiffs' WSSA claim against First

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Seattle, WA 98104-7044 | Tel: 206.839.4800

American and eAppraiseIT necessarily depends on Plaintiffs' allegations relating to (i) appraisals in connection with the origination of mortgages; (ii) the promotion, marketing, and sales of the Certificates to Plaintiffs; and (iii) the purported deceptive advertisement of the quality of the mortgage pool loans underlying the Trusts. AC ¶¶ 224, 226. Accordingly, the WSSA claim is preempted by 12 C.F.R. § 560.2(b)(9) and (10) because it is based on Plaintiffs' allegations that Defendants violated federal regulations in connection with the origination of, and alleged disclosures about, residential mortgages. *See Spears I*, 2009 WL 605835 at *5-6; *Spears II*, 2009 WL 2761331 at *5-6; *Silvas*, 514 F.3d at 1006 (barring preempted claims "based on … *disclosures and advertising*"); *IndyMac*, 2008 WL 3992304 at *8-9 (barring preempted claims challenging appraisal practices).

Even if there were any doubt concerning preemption, *Silvas* mandates that "[a]ny doubt should be resolved in favor of preemption." *Id.* at 1005. This Court should dismiss Plaintiffs' WSSA claim against First American and eAppraiseIT.

VII. PLAINTIFFS' WSSA CLAIM FAILS AS A MATTER OF LAW FOR ADDITIONAL AND INDEPENDENT REASONS.

WSSA provides a private right of action to remedy certain wrongful conduct in securities transactions. RCW 21.20.010, which is structured similarly to SEC Rule 10b-5, provides that is unlawful to: (1) "employ any device, scheme, or artifice to defraud"; (2) "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made ... not misleading"; or (3) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," in connection with the purchase or sale of a security. WSSA's private right of action, RCW 21.20.430, permits a claim against a person who unlawfully "offers or sells" a security in violation of RCW 21.20.010. *See* RCW 21.20.430(1). To state a claim for relief under WSSA, a plaintiff must allege facts demonstrating ***both*** (1) that the defendant violated RCW 21.20.010; ***and*** (2) that the defendant is a "seller" or "offeror" of the security. *See Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 851, 786 P.2d 285 (1990); *Swartz v. Deutsche Bank*, No. C03-1252MJP, 2008 WL

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1968948, *22 (W.D. Wash. May 2, 2008) ("In order to maintain an action under the WSSA, the plaintiff must show the defendant made either an untrue statement of material fact or omitted such a fact in connection with a security transaction and that the defendant was a seller or offeror of the security."). Plaintiffs fail to satisfy either of WSSA's basic requirements.

A. Plaintiffs Cannot Allege That First American Or eAppraiseIT Made Any Actionable Misrepresentation Or Omission.

Plaintiffs allege that defendants violated WSSA in two ways — by making material misstatements and omissions in the offering documents for the Certificates (RCW 21.20.010(2)), and by engaging in "acts, practices and/or a course of business" that "operated as a deceit upon Plaintiffs" (RCW 21.20.010(3)). AC ¶¶ 228-229, 239. In substance, Plaintiffs' two sets of allegations are identical: Plaintiffs allege that First American and eAppraiseIT should be liable for alleged misrepresentations in the offering documents for the Certificates concerning the independence of the appraisal process and the loan-to-value ratios of the various mortgage pools.[15] Inasmuch as Plaintiffs' allegations are, at bottom, allegations of misrepresentations or omissions in the offering documents, Plaintiffs' claim, if any, falls exlusively under RCW 21.20.010(2). *See, e.g., Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 938 (9th Cir. 2009) (analyzing similar provisions of Rule 10b-5; "Misrepresentations and most omissions fall under the prohibition of Rule 10b-5(b), whereas manipulative conduct [is covered by Rule 10b-5(a) and (c)]."). Accordingly, the Court need only consider whether Plaintiffs have alleged an actionable misrepresentation or omission by First American or eAppraiseIT.[16] Under that standard, Plaintiffs' claim fails as a matter of law.

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[15] *Compare* AC ¶¶ 237 (claiming violation of RCW 21.20.010(2); alleging that First American and eAppraiseIT failed to disclose that their "independence from WaMu was compromised" and the "significance [sic] risk the LTV ratios provided in the Offering Documents are understated,") *and* 238 (alleging that LTV ratios in offering documents were misleading), *with* ¶ 246 (claiming violation of RCW 21.20.010(3); alleging that "***undisclosed*** involvement and influence" of WaMu on appraisal process "deceive[d] Plaintiffs" about appraisers' "independence and the reliability of the LTV ratios specified in the Offering Documents as well as the potential for ***future disclosure of those facts*** to negatively impact the value of the Certificates") (emphasis added).

[16] Any claim against First American and eAppraiseIT under RCW 21.20.010(3) must fail, because Plaintiffs have not alleged that they relied on any conduct by First American or eAppraiseIT. WSSA requires plaintiffs to plead and prove reasonable reliance on the alleged statements or misconduct. *See, e.g., Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 134, 787 P.2d 8 (1990); *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 264, 93 P.3d 919 (2004).

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Plaintiffs cannot allege any actionable misrepresentation by First American or eAppraiseIT relating to the Certificates, for the simple reason that neither First American nor eAppraiseIT was involved in any way with the Certificates or the offerings. Plaintiffs tacitly acknowledge as much: They do not allege (nor could they) that First American or eAppraiseIT actually made any statements that were included in the Registration Statement or in any of the Prospectus Supplements. Plaintiffs instead allege that First American and eAppraiseIT violated WSSA because their allegedly inflated appraisals ***allowed WaMu to make*** misrepresentations in the offering documents. *E.g.*, AC ¶¶ 81, 225 ("Without certified appraisals, the WaMu Defendants could not have credibly specified the LTV ratios of the mortgages in the Offering Documents."), 235 (alleging First American and eAppraiseIT are liable for misstatements in offering documents "derived from" appraisals). Those allegations fail to state a WSSA claim as a matter of law. WSSA does not impose liability on parties based on the conduct or statements of others; rather, WSSA liability requires the defendant to have actually made a false or misleading statement. *See Burgess v. Premier Corp.*, 727 F.2d 826, 833 (9th Cir. 1984) ("[Under WSSA], some liability-producing action by [the defendants] themselves is required. And because there is no evidence that [defendants] made any misrepresentations, they are not subject to liability under this statute."); *Swartz*, 2008 WL 1968948 at *22.[17]

Plaintiffs here do not (and cannot) allege that they knew of, or relied on, any alleged conduct of First American or eAppraiseIT when they purchased the Certificates. The offering documents do not even mention First American or eAppraiseIT, and Plaintiffs allege they relied solely on statements in the offering documents. *See* AC ¶ 251; *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 160 (2008) ("In effect petitioner contends that … investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect. Were this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule.").

[17] Even if Plaintiffs were to argue that the statements made by WaMu entities should be attributed to First American and eAppraiseIT, courts have consistently held that a party cannot be deemed responsible for the allegedly misleading public statement of another unless, at a very minimum, it substantially participated in the preparation of that statement. *See Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000) ("[W]e have held that substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability …."). Here, First American and eAppraiseIT did not play any role whatsoever — let alone a substantial one — with respect to the Registration Statement or the Prospectus Supplements. The strongest allegation Plaintiffs can muster to link First American and eAppraiseIT to the Certificates is the conclusory — and insufficient — allegation that First American was aware that WaMu and other lenders securitize mortgage loans. *See* AC ¶¶ 117 ("First American acknowledged that its operating revenue had been adversely impacted '***by the***

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Moreover, neither First American nor eAppraiseIT can be liable for any alleged "omissions" in connection with the offerings of the Certificates, because First American and eAppraiseIT owed no duty to Plaintiffs. *See Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading …."). As discussed above, Plaintiffs do not allege that First American or eAppraiseIT played any role in the securitization process or in the offerings of the Certificates. The *only* acts or conduct that Plaintiffs allege First American and eAppraiseIT engaged in relate *exclusively* to the preparation of appraisals in connection with the origination of mortgage loans for WaMu. Such alleged conduct cannot, as a matter of law, generate any duty to parties who later invest in certificates issued by the WaMu Trusts.[18] *See Chiarella v. United States*, 445 U.S. 222, 232-33 (1980) (party had no duty to selling shareholders where he "had no prior dealings with them[,] … [h]e was not their agent, he was not a fiduciary, [and] he was not a person in whom the sellers had placed their trust and confidence"); *Monroe v. Hughes*, 31 F.3d 772, 776 (9th Cir. 1994) (auditor had no disclosure duty where "it had no direct relationship with the investors, derived no benefit from any relationship with the investors and played no role in initiating the securities transactions").

B. Defendants Are Not "Sellers" Under WSSA.

Plaintiffs' WSSA claim fails for the additional reason that neither First American nor eAppraiseIT is a "seller" of the Certificates. A party is a "seller" under WSSA ***only*** if his acts

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decline in mortgage originations and the tightening of the credit markets which led to a decrease in mortgage securitization ….'") (emphasis in original), 226 (alleging that First American "knew, directly from WaMu Defendants and through their involvement with the mortgage industry generally, that WaMu would provide the LTV ratios that flowed directly and necessarily from the appraisals to investors to induce them to purchase the Certificates"). As a matter of law, such allegations fail to establish substantial participation in the creation of any statement. *See, e.g.*, *Siemers*, 2006 WL 3041090 at *11 (dismissing claims against defendants who did not sign, approve, or otherwise substantially participate in making statements in offering documents); *Commc'ns Workers of Am. Plan for Employees' Pensions & Death Benefits v. CSK Auto Corp.*, No. CV06-1503-PHX-DGC, 2007 WL 951968 (D. Ariz. Mar. 28, 2007); *In re Cylink Sec. Litig.*, 178 F. Supp. 2d 1077, 1084-85 (N.D. Cal. 2001).

[18] As noted above, the Prospectus Supplements do not include identifying information about the mortgage loans held by the WaMu Trusts or the properties secured by those mortgages, including the appraised values. Nor do the Prospectus Supplements identify the appraisers who conducted appraisals in connection with the mortgage loans. It is therefore impossible to determine from the offering documents whether the property securing any loan held by any particular issuing WaMu Trust was appraised by an eAppraiseIT staff or contract appraiser, an LSI appraiser, or another third-party appraiser, or whether the underlying loan was even originated by WMB.

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were a "substantial contributive factor" in the securities transaction. *See Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 131, 744 P.2d 1032 (1987). In *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 149, 787 P.2d 8 (1990), the Washington Supreme Court found that a professional service provider is not a "substantial contributive factor" in a securities offering absent some level of "active participation" in the transaction itself. The *Hines* court held that a law firm that advised an issuer was not a "seller" under WSSA, where the law firm had no "personal contact with any of the investors or was in any way involved in the solicitation process" and was therefore "not a catalyst in the sales transaction." *Id*. at 149-50.

In *Wade v. Skipper's Inc.*, 915 F.2d 1324 (9th Cir. 1990), the Ninth Circuit similarly held that a corporate franchisor was not a "seller" of a franchisee's limited partnership interests, where the franchisor had no role in preparing the offering documents or soliciting investors. The franchisor had provided certain financial information to the seller's agent and discussed with the agent financial projections that were included in the offering documents, but the court held that such conduct was insufficient as a matter of law to render the franchisor a seller:

> Skipper's conduct in giving [seller's agent] financial information for other Skipper's restaurants … discussing estimated projections with [seller's agent], and receiving copies of the Offering Memorandum is ***insufficient to constitute a "substantial contributive factor" in the sale of the limited partnership interests.***

Id. at 1329 (emphasis added); *see also Brin v. Stutzman*, 89 Wn. App. 809, 830, 951 P.2d 291 (1998) (affirming dismissal of WSSA claim; defendant "did not act together with the issuers of the [security]" and did not "take any part in the actual sales process by acting as the 'catalyst' between the [securities] dealers and [plaintiff]") (citations omitted); *Shinn*, 56 Wn. App. at 851 (affirming dismissal of WSSA claim where "[t]he absence of any real promotional conduct on the part of [defendant]" supported conclusion that "no 'sale' within the meaning of the statutes occurred").[19]

[19] *Accord Tumelson Family Ltd. P'ship v. World Fin. News Network*, 242 F. App'x 385, 387 (9th Cir. Feb. 28, 2007) (defendant entitled to judgment as a matter of law on WSSA claim because there "was no evidence that [the parties] discussed buying stock, that Defendant [] had the attributes of a seller, or that Plaintiffs relied on Defendant [] to make their investment decisions, much less that any reliance would have been reasonable").

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

Here, Plaintiffs cannot allege that First American or eAppraiseIT was a "substantial contributive factor" in any offer or sale of the Certificates. Plaintiffs claim that First American and eAppraiseIT are "sellers" because the USPAP-compliant appraisals were necessary in order to securitize mortgage loans and ultimately package and issue the Certificates, and because First American and eAppraiseIT allegedly knew that WaMu would include LTV ratios calculated based on the appraised values of mortgage properties in the offering documents for mortgage-backed securities. *See* AC ¶¶ 225-226. But those allegations do not establish any nexus between First American or eAppraiseIT and the offer or sale of the Certificates. The home appraisal process — which takes place before a mortgage loan is even finalized — is simply too far removed from a third-party's subsequent decision to pool, securitize and offer a mortgage loan to investors to serve as a basis for imposing WSSA liability. Because the Amended Complaint is devoid of any factual allegation that would, if true, show that First American or eAppraiseIT prepared, reviewed, or approved any offering document, or had any involvement in marketing or soliciting investors for the Certificates, Plaintiffs cannot establish the "seller" element of their WSSA claim as a matter of law, and the WSSA claim should be dismissed with prejudice.

C. Plaintiffs' "Control Person" Claim Against First American Fails.

Because, as explained above, Plaintiffs have not established a claim for primary liability under WSSA against eAppraiseIT, Plaintiffs' claim for secondary "control person" liability against First American should also be dismissed with prejudice.

VIII. CONCLUSION

For all of the above reasons, First American and eAppraiseIT respectfully request that the Court dismiss Plaintiffs' Consolidated Complaint with prejudice.

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

RESPECTFULLY SUBMITTED this 29th day of January, 2010.

/s/ Stellman Keehnel

Stellman Keehnel, WSBA No. 9309
Christopher M. Huck, WSBA No. 34104
R. Omar Riojas, WSBA No. 35400
Bradley T. Meissner, WSBA No. 39592
DLA PIPER LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, Washington 98104
Telephone: 206.839.4800
Fax: 206.839.4801
E-mail: stellman.keehnel@dlapiper.com
christopher.huck@dlapiper.com
omar.riojas@dlapiper.com
bradley.meissner@dlapiper.com

Richard F. Hans (admitted *pro hac vice*)
Kerry F. Cunningham (admitted *pro hac vice*)
Corey Elanor Delaney (admitted *pro hac vice*)
DLA PIPER LLP (US)
1251 Avenue of the Americas
27th Floor
New York, New York 10020-1104
Tel: 212.335.4500
Fax: 212.335.4501
E-mail: richard.hans@dlapiper.com
kerry.cunningham@dlapiper.com
corey.delaney@dlapiper.com

Attorneys for Defendants
The First American Corporation and
eAppraiseIT, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010, I electronically filed the foregoing **MOTION TO DISMISS** and the accompanying **[PROPOSED] ORDER GRANTING MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- Adam Zurofsky azurofsky@cahill.com
- Andrew B. Brettler abrettler@stblaw.com
- Arthur L. Shingler ashingler@scott-scott.com, efile@scott-scott.com
- Barry Robert Ostrager bostrager@stblaw.com, managingclerk@stblaw.com
- Bradley T. Meissner bradley.meissner@dlapiper.com
- Brian C. Free bcf@hcmp.com, gcp@hcmp.com
- Bruce Earl Larson blarson@karrtuttle.com, psteinfeld@karrtuttle.com
- Christopher E. Lometti clometti@cohenmilstein.com
- Christopher M. Huck Christopher.huck@dlapiper.com, karen.hansen@dlapiper.com
- Corey E. Delaney corey.delaney@dlapiper.com, kerry.cunningham@dlapiper.com, patrick.smith@dlapiper.com, richard.hans@dlapiper.com
- Daniel B. Rehns drehns@cohenmilstein.com
- David Daniel Hoff dhoff@tousley.com, efile@tousley.com
- David M. Balabanian david.balabanian@bingham.com
- Dennis H. Walters dwalters@karrtuttle.com, wbarker@karrtuttle.com
- Erik D. Peterson epeterson@btkmc.com, knguyen@btkmc.com
- Floyd Abrams fabrams@cahill.com
- Frank Busch frank.busch@bingham.com, frank.downing@bingham.com
- Gavin Williams Skok gskok@riddellwilliams.com, dhammonds@riddellwilliams.com

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

- Hal D. Cunningham hcunningham@scott-scott.com, efile@scott-scott.com, halcunningham@gmail.com
- James J. Coster jcoster@ssbb.com, jregan@ssbb.com, managingclerk@ssbb.com
- Joel P. Laitman jlaitman@cohenmilstein.com
- John D. Lowery jlowery@riddellwilliams.com, dhammonds@riddellwilliams.com
- John D. Pernick john.pernick@bingham.com
- Jonathan Gardner jgardner@labaton.com
- Joseph P. Guglielmo jguglielmo@scott-scott.com, efile@scott-scott.com
- Joshua M. Rubins jrubins@ssbb.com, jregan@ssbb.com, managingclerk@ssbb.com
- Kenneth J. Pfaehler kpfaehler@sonnenschein.com, nreeber@sonnenschein.com
- Kenneth M. Rehns krehns@cohenmilstein.com
- Kerry F. Cunningham kerry.cunningham@dlapiper.com
- Kevin P. Chavous kchavous@sonnenschein.com
- Kim D. Stephens kstephens@tousley.com, cbonifaci@tousley.com, kzajac@tousley.com
- Larry Steven Gangnes gangnesl@lanepowell.com, docketing-sea@lanepowell.com, donnellyjossm@lanepowell.com, sebringl@lanepowell.com
- Leslie D. Davis ldavis@sonnenschein.com
- Louis David Peterson ldp@hcmp.com, smp@hcmp.com
- Mary Kay Vyskocil mvyskocil@stblaw.com
- Michael H. Barr mbarr@sonnenschein.com
- Mike Liles, Jr. mliles@karrtuttle.com
- Nancy A. Pacharzina npacharzina@tousley.com, kzajac@tousley.com
- Paul Scarlato pscarlato@labaton.com, ElectronicCaseFiling@labaton.com
- Paul Joseph Kundtz pkundtz@riddellwilliams.com, mbergquam@riddellwilliams.com, mdowns@riddellwilliams.com

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800

- Ramzi Abadou rabadou@btkmc.com, knguyen@btkmc.com
- Richard F. Hans richard.hans@dlapiper.com, dorinda.castro@dlapiper.com
- Robert D. Stewart stewart@kiplinglawgroup.com, cannon@kiplinglawgroup.com
- Robert J. Pfister rpfister@stblaw.com
- Rogelio Omar Riojas omar.riojas@dlapiper.com, nina.marie@dlapiper.com
- Stellman Keehnel stellman.keehnel@dlapiper.com, patsy.howson@dlapiper.com
- Stephen M. Rummage steverummage@dwt.com, jeannecadley@dwt.com
- Steve W. Berman steve@hbsslaw.com, heatherw@hbsslaw.com, robert@hbsslaw.com
- Steven J. Toll stoll@cohenmilstein.com, efilings@cohenmilstein.com
- Steven P. Caplow stevencaplow@dwt.com, belenjohnson@dwt.com
- Tammy Roy troy@cahill.com
- Timothy Michael Moran moran@kiplinglawgroup.com, cannon@kiplinglawgroup.com
- Walter Eugene Barton gbarton@karrtuttle.com, danderson@karrtuttle.com, nrandall@karrtuttle.com

Signed at Seattle, Washington, this 29th day of January, 2010.

/s/ Stellman Keehnel
Stellman Keehnel, WSBA No. 9309

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DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 | Tel: 206.839.4800